Supreme Court, U. S.
FILED
DEC 22 1977
MICHAEL RODAK, JR., CLERK

No. A-335

In the Supreme Court of the United States

OCTOBER TERM, 1977

77-1085

AMERICAN BILTRITE, INC., TENNESSEE PUBLIC SERVICE COMMISSION, DEPARTMENT OF COMMUNITY AND ECONOMIC DEVELOPMENT OF THE STATE OF TENNESSEE, CITY OF CENTERVILLE, CITY OF HOHENWALD, AND HICKMAN AND LEWIS COUNTIES, TENNESSEE,

Petitioners,

V.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JAMES N. CLAY, III
FRED M. ACUFF, JR.
2700 Sterick Building
Memphis, Tennessee 38103

Of Counsel:

PITTMAN, CLAY, MORGAN,
GILLILAND & SAUNDERS
2700 Sterick Building
Memphis, Tennessee 38103

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	
I. The Court of Appeals, In Affirming the Action of the Interstate Commerce Commission, Did Not Observe the Statutory Presumptions and Intent of the Railroad Revitalization and Regulatory Reform Act	5
II. The Financial Data Provided by the Railroad and Relied Upon by the ICC did not Support the Abandonment Order	7
CONCLUSION	8
APPENDIX A	9
APPENDIX B	11
APPENDIX C	12
APPENDIX D	14

TABLE OF STATUTES AND AUTHORITIES

	Page
STATUTES:	
Interstate Commerce Act, 49 USC 1a	3, 5
Railroad Revitalization and Regulatory Reform Act of 1976	2, 3, 4, 5, 8
TREATISES:	
McCormick, *Evidence*, Section 307	7
OTHER:	
Senate Report (Commerce Commission) No. 94-499, November 26, 1975	6

No. A-335

In the Supreme Court of the United States

OCTOBER TERM, 1977

AMERICAN BILTRITE, INC., TENNESSEE PUBLIC SERVICE COMMISSION, DEPARTMENT OF COMMUNITY AND ECONOMIC DEVELOPMENT OF THE STATE OF TENNESSEE, CITY OF CENTERVILLE, CITY OF HOHENWALD, AND HICKMAN AND LEWIS COUNTIES, TENNESSEE,

Petitioners,

V.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, American Biltrite, Inc., by and on behalf of itself and all petitioners, prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Order of the Court of Appeals of June 27, 1977, is not yet reported and is attached hereto as Appendix A. The Order of the Court of Appeals of July 25, 1977, is not yet reported and is attached hereto as Appendix B. The

Decision and Order of the Interstate Commerce Commission, dated November 29, 1976, Docket No. AB-2 (Sub-No. 5) is attached hereto as Appendix C. That Order affirmed the report and findings of the Administrative Law Judge dated May 27, 1976 and that decision is attached hereto as Appendix D.

JURISDICTION

The judgment of the Court of Appeals was entered on June 27, 1977. A timely petition for rehearing was denied by order entered July 25, 1977. An order was entered on October 12, 1977, extending the time for the filing of this Petition. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission failed to recognize the statutory burden of proof requirement of the Interstate Commerce Act.
2. Whether the Interstate Commerce Commission properly considered the financial data provided by the Louisville and Nashville Railroad in determining "public convenience and necessity."

STATUTES INVOLVED

The Railroad Revitalization and Reform Act (the "4-R" Act), 45 USC 801, et seq., was enacted:

> to provide the means to rehabilitate and maintain the physical facilities, improve the operations and structure, and restore the financial stability of the railway system of the United States, and to promote the revitalization of such railway system, so that this mode of transportation will remain viable in the private sector of the economy and will be able to provide energy-efficient, ecologically compatible transportation services with greater efficiency, effectiveness, and economy, through--

> (1) ratemaking and regulatory reform;
>
> (2) the encouragement of efforts to restructure the system on a more economically justified basis, including planning authority in the Secretary of Transportation, an expedited procedure for determining whether merger and consolidation applications are in the public interest, and continuing reorganization authority;
>
> (3) financing mechanisms that will assure adequate rehabilitation and improvement of facilities and equipment, implementation of the final system plan, and implementation of the Northeast Corridor project;
>
> (4) transitional continuation of service on light-density rail lines that are necessary to continued employment and community well-being throughout the United States;
>
> (5) auditing, accounting, reporting, and other requirements to protect Federal funds and to assure repayment of loans and financial responsibility; and
>
> (6) necessary studies.
>
> (45 USC 801(a)).

Section 802 of the "4-R" Act was amended to provide in part:

> The burden of proof as to public convenience and necessity shall be upon the applicant for a certificate of abandonment or discontinuance.
>
> 49 USC 1a.

STATEMENT OF THE CASE

On November 29, 1976, the Interstate Commerce Commission issued its Decision and Order, Docket No. AB-2 (Sub-No. 5), entitled "Louisville and Nashville Railroad Company, Abandonment Between Colesburg and Hohenwald in Dickson, Hickman and Lewis Counties, Tennes-

see." This Order affirmed and adopted the report and findings of the decision of the Administrative Law Judge in that proceeding. In short, the decision allowed the abandonment of the rail line in question.

On October 1, 1973, the Louisville and Nashville Railroad Company (L&N) filed for a certificate of public convenience and necessity pursuant to Section 1 (18)-(20) of the Interstate Commerce Act, for permission to abandon that portion of its railroad that extends in a southwesterly direction from Mile Post 2 at Colesburg, Tennessee to approximately Mile Post 52 near Hohenwald, Tennessee. The line in question is approximately 50.5 miles long. Protests were filed to L & N's request by a variety of parties, including petitioner, American Biltrite, Inc., Brotherhood of Maintenance of Way Employees, the City of Hohenwald, Tennessee, the Department of Economic and Community Development of the State of Tennessee, Fibreboard Corporation, Hickman County, Tennessee, J. M. Huber Corporation, Lewis County, Tennessee, the Tennessee Public Service Commission and the United Transportation Union. A hearing was held before the Administrative Law Judge on January 14-16, 1976, in Nashville, Tennessee and on May 17, 1976, she ruled, *inter alia*, that the proposed abandonment should be permitted. The Interstate Commerce Commission affirmed, *supra*.

An appeal was initiated on December 16, 1976, by a petition for review of the Order of the Commission. The Commission's Order of abandonment was stayed pending the outcome of the appeal. After the orders of the Court of Appeals, the Commission certified the abandonment of the line on October 20, 1977.

The evidence adduced at the hearing as well as the position of the petitioners is adequately set out in the Opinion of the Administrative Law Judge. Those portions of the opinion relevant to the arguments of petitioners shall be discussed herein.

REASONS FOR GRANTING THE WRIT

This case involves vital issues regarding the abandonment of railway lines in the United States. Particularly, it involves the extent to which those lines shall be abandoned under the auspices of The Railroad Revitalization and Regulatory Reform Act (the "4-R" Act.).

I.

THE COURT OF APPEALS, IN AFFIRMING THE ACTION OF THE INTERSTATE COMMERCE COMMISSION, DID NOT OBSERVE THE STATUTORY PRESUMPTIONS AND INTENT OF THE RAILROAD REVITALIZATION AND REGULATORY REFORM ACT.

The Railroad Revitalization and Reform Act (the "4-R" Act), 45 USC 801, et seq., was enacted:

> to provide the means to rehabilitate and maintain the physical facilities, improve the operations and structure, and restore the financial stability of the railway system of the United States, and to promote the revitalization of such railway system, so that this mode of transportation will remain viable in the private sector of the economy and will be able to provide energy-efficient, ecologically compatible transportation service with greater efficiency, effectiveness, and economy . . . (45 USC 801(a)).

As part of the statutory scheme, Congress amended Section 1 of the Interstate Commerce Act (49 USC 1a) by providing a new section prescribing the method by which rail service may be discontinued and abandoned. The new requirements promulgated include filing and notice requirements, provision for hearings and the availability of continuance of service through subsidy or acquisition by affected parties. See Section 802 of the Act.

In recognition of the severity of discontinuance or abandonment of rail service, the Congress established a clear

burden of proof to be borne by the railroad seeking such extreme relief. The Section now provides:

> The burden of proof as to public convenience and necessity *shall be upon the applicant for* a certificate of abandonment or discontinuance.
>
> 49 USC 1a (emphasis added).

The legislative history of the "4-R" Act clearly demonstrates the intent of Congress to not only restore the stability of the railway system but also to maintain the economy of the nation by the continuance of rail service. The report of the Senate Commerce Committee of November 26, 1975 (Senate Report No. 94-499) declared:

> The importance of railroads to our Nation's economy cannot be overemphasized. Even after decades of expanding truck, air and barge operations and a deteriorating rail industry, railroads are still the leading carrier in terms of freight ton-miles. The more than 850 billion ton-miles moved in 1973 represent approximately the same volume as all other carriers combined, except pipelines.
>
> (Senate Report No. (4-499, p. 4).

By providing for the burden of proof to be placed upon the railroad, Congress implemented its intent to favor continuance of service. The railroad itself must justify depriving the economy of that important means of transportation. Thus, the commission is obliged to rule in favor of continuance unless there is clear proof to the contrary.

It is of dubiety whether the Commission in the instant case followed such standard. The opinion of the Administrative Law Judge, stated, "The Act states that abandonment shall occur unless and until the Commission issues a certificate that the present or future public convenience and necessity permit such abandonment. To make this judgment, it is necessary to weigh the arguments advanced pro and con." (see p. 28, infra). This is not the standard imposed by the Act, nor, it is submitted, is it the proper standard to be imposed. A mere "weighing" of the arguments does not cast the burden upon the railroad but contrarily, imposes an equal burden upon railroad and protestants.

It is manifestly clear what Congress intended by the use of the phrase "burden of proof." That such a mere weighing of the evidence was not intended is shown by the universal definition of the standard set by the Act.

> Usually the party who has the duty of pleading a fact has also the first burden of producing evidence of the fact. . . . Likewise the pleader will ordinarily be found at the close of the evidence to have this ultimate burden of persuasion.
>
> McCormick, *Evidence*, Section 307.

The Administrative Law Judge weighed the evidence, but she apparently did not so consider the evidence with the knowledge that the task of persuasion was upon the railroad and not upon all parties equally.

A reading of the Judge's opinion and the affirming Order of the Commission discloses *no* reference to the statutory burden of proof. Protestants were, therefore, forced to argue their positions without the statutory presumption Congress had granted. Review by this Court is necessary to resolve and determine the proper burden of proof that shall be imposed in rail abandonment cases.

II.

THE FINANCIAL DATA PROVIDED BY THE RAILROAD AND RELIED UPON BY THE ICC DID NOT SUPPORT THE ABANDONMENT ORDER.

Although the decision of the Administrative Law Judge correctly states that losses had occurred during the operation of the line (p. 28, infra), there is not adequate discussion or consideration of the clear probability that the railroad's application to abandon on October 1, 1973 would, in fact, enhance such losses. It is not reasonable that new industry or other potential users of the line would locate along the railroad after the announced decision to discon-

tinue service. The railroad thus perpetuated its argument in favor of abandonment.

It appears that the failure of profitable operation is, of itself, reason to allow abandonment. If this is the proper test, Commission action is unnecessary. A railway would merely display its loss statements and proceed to close its lines. Such an interpretation is in clear contravention of the Congressional intent to promote railway service that is "viable in the private section of the economy." 45 USC 801 (a). Unless this Court agrees to review the standards to be imposed upon railroads seeking to discontinue service, the intent of Congress will be frustrated. Review is necessary to insure that the determination of "public convenience and necessity" is not left to the discretion of the rail carriers alone.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES N. CLAY, III
FRED M. ACUFF, JR.
2700 Sterick Building
Memphis, Tennessee 38103

Of Counsel:

PITTMAN, CLAY, MORGAN,
GILLILAND & SAUNDERS

APPENDIX A

No. 76-2651

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

TENNESSEE PUBLIC SERVICE COMMISSION, ET AL.

Petitioners

and

AMERICAN BILTRITE, INC.,

Intervening Petitioner ORDER

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION

Respondents

and

LOUISVILLE AND NASHVILLE RAILROAD COMPANY

Intervening Respondent

Before: WEICK *and* PECK, Circuit Judges, *and* FREEMAN*, Senior District Judge.

This matter is before the Court under a petition to review an order of the Interstate Commerce Commission which found that the present and future public convenience and necessity permit abandonment of service by the

*Honorable Ralph M. Freeman, United States District Court for the Eastern District of Michigan, sitting by designation.

intervenor Louisville and Nashville Railroad Company between Colesburg and Hohenwald in Dickson, Hickman and Lewis Counties, Tennessee, and has been submitted on the briefs and oral arguments of counsel for the petitioners, respondents and intervenors. In this regard, notation is made of the fact that Willamette Industries, Inc., filed a motion for leave to intervene on June 9, 1977, and a memorandum in opposition to said motion was filed by the Interstate Commerce Commission June 13, 1977; in view of the fact that the matter was set for hearing on the merits on June 16, 1977, and was heard on that date, said motion is denied as untimely. Being fully advised in the premises, the Court concludes that the Interstate Commerce Commission's decision to grant the abandonment application is rational and supported by substantial evidence. Therefore,

IT IS ORDERED that the order of the Interstate Commerce Commission here under review be and it hereby is affirmed.

ENTERED BY ORDER OF THE COURT

JOHN P. HEHMAN, *Clerk of Court*

APPENDIX B

No. 76-2651

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

TENNESSEE PUBLIC SERVICE COMMISSION, ET AL.

Petitioners

and

AMERICAN BILTRITE, INC.,
Intervening Petitioner

v.

ORDER

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION
Respondents

and

LOUISVILLE AND NASHVILLE
RAILROAD COMPANY
Intervening Respondent

Before: WEICK and PECK, Circuit Judges, and FREEMAN*, Senior District Judge.

This matter having been submitted under the petitioners' petition for rehearing, and it having been concluded that said petition is not well taken,

IT IS ORDERED that the Petition for Rehearing be and it hereby is denied, with the observation that in entering its order of June 27, 1977, the Court was guided by the statutory presumptions and requirements of the Railroad Revitalization and Regulatory Reform Act, 45 U.S.C. §801, et seq.

ENTERED BY ORDER OF THE COURT
JOHN P. HEHMAN, *Clerk of Court*

APPENDIX C

DECISION AND ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, held at its office in Washington, D.C., on the 18th day of November, 1976.

Docket No. AB-2 (Sub.-No. 5)

LOUISVILLE AND NASHVILLE RAILROAD COMPANY—
ABANDONMENT BETWEEN COLESBURG AND HOHENWALD
IN DICKSON, HICKMAN AND LEWIS
COUNTIES, TENNESSEE

Upon consideration of the application and the record in the above-entitled proceeding, including the initial decision and recommended order of the Administrative Law Judge, the exceptions filed jointly by American Biltrite, Inc., J. M. Huber Corporation and Fibreboard Corporation and jointly by Tennessee Public Service Commission, United Transportation Union, Department of Economic and Community Development, Hickman and Lewis Counties and the Cities of Hohenwald and Centerville, Tenn., and the reply thereto of the Louisville and Nashville Railroad Company; and

It appearing, That the Administrative Law Judge recommended that the application in the above-entitled proceeding be granted;

It further appearing, That the findings and conclusions of the Administrative Law Judge, with respect to all matters of fact and law disposed of in her report, are in all material respects proper and correct; that the pleadings present no new material matters of fact or law not adequately considered and properly disposed of by the Administrative Law Judge in her report, and are not of such a nature as to require the issuance of a report discussing the evidence in the light of the pleadings;

It further appearing, That this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National

Environmental Policy Act of 1969:

Wherefore, and good cause appearing therefor:

We find, That the evidence considered in the light of the pleadings does not warrant a result different from that reached by the Administrative Law Judge, and that the statement of facts, the conclusions, and the findings of the Administrative Law Judge, in her report, being proper and correct in all material respects, should be, and they are hereby, affirmed and adopted as our own; and

It is ordered, That subject to the same conditions for protection of employees as set forth in *Chicago B&Q R. Co. Abandonment*, 257 I.C.C. 700, the present and future public convenience and necessity permit abandonment by the Louisville & Nashville Railroad Company (L&N) of the line of railroad which turns out of the L&N's main line at Colesburg, Dickson County, Tenn., and extends from milepost 2 to just south of milepost 52 near Hohenwald, Lewis County, Tenn.; *provided*, *however*, that any responsible state agency and/or local government or other interest responsible organization be given the opportunity for a period of 90 days from the date of issuance of a certificate of public convenience and necessity permitting abandonment to negotiate the purchase of all or any portion of the right-of-way of the line to be abandoned for public use at a purchase price on such terms as the parties may agree as just and reasonable, and that L&N shall hold the involved property under the tracks intact for this period of time;

It is further ordered, That subject to the conditions set forth in the initial decision for the provision of financial assistance for continued operations or acquisition of the subject line, an appropriate certificate of abandonment shall be issued, and the applicant shall not effect any abandonment or discontinuance of service prior to the effective date of such certificate of abandonment;

It is further ordered, That this order be effective 35 days from the date of service hereof.

By the Commission, Division 3, Commissioners Brown, MacFarland and Clapp.

ROBERT L. OSWALD, *Secretary*

APPENDIX D
INTERSTATE COMMERCE COMMISSION

INITIAL DECISION

No. AB-2 (Sub-No. 5)

LOUISVILLE AND NASHVILLE RAILROAD COMPANY
ABANDONMENT BETWEEN COLESBURG AND HOHENWALD
IN DICKSON, HICKMAN AND LEWIS
COUNTIES, TENNESSEE

Public convenience and necessity shown to permit abandonment by Louisville and Nashville Railroad Co. of its Centerville Branch. Conditions prescribed. Issuance of a certificate withheld pending compliance with Public Law 94-210.

Fred R. Birkholz and *Wandaleen Poynter* for applicant.

E. Warner Bass, Douglas T. Bates, James N. Clay, H. J. Coffey, Joseph T. Hester, William Landis Turner and *Eugene W. Ward* for protestants.

By Brenda P. Murray, Administrative Law Judge:

This is an application by the Louisville and Nashville Railroad Co. (L&N or Railroad), filed October 1, 1973,[1] under section 1 (18)-(20) of the Interstate Commerce Act, for a certificate of public convenience and necessity permitting the abandonment of that portion of railroad which turns out of the L&N's Nashville to Bruceton main line at Colesburg, Dickson County, Tenn., and extends in a southwesterly direction from Mile Post (M.P.) 2 at Colesburg, through Hickman County to just south of M.P. 52 near Hohenwald, Lewis County, Tenn., a distance of approximately 50.5 miles (Centerville Branch).[2]

[1] The delay in processing resulted from court appeals in *Harlem Valley Transportation Ass'n* v. *Stafford*, 360 F. Supp. 1057 (S.D.N.Y. 1973) aff'd 500 F. 2d 328 (1974).

[2] The Railroad intends to leave the line in place to M.P. 5. It will be reclassified as an industrial spur and will serve the proposed Dickson Industrial Park. The application covers the total branch.

The Commission's staff issued an "environmental threshold assessment survey" which found that no significant impact on the environment would result from abandonment of the line.[3] This assessment was widely publicized and comments requested. Based on the staff assessment and the comments received, the Commission found in an order served September 15, 1975, that an "environmental impact statement" need not be issued because the proceeding did not present a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969, U.S.C. #4321, et seq.

Notice of the proposed abandonment was posted and served as required under the act and the Commission's regulations. Protests were filed and the matter was referred to me for hearing and preparation of an initial decision. A hearing was held on January 14-16, 1976, at Nashville, Tenn., at which the application was opposed by American Biltrite, Inc., Brotherhood of Locomotive Engineers, Brotherhood of Maintenance of Way Employees, City of Hohenwald, Tenn., Department of Economic and Community Development of the State of Tennessee, Fibreboard Corporation, Hickman County, Tenn., J. M. Huber Corp., Lewis County, Tenn., Tennessee Public Service Commission and the United Transportation Union. The Brotherhood of Locomotive Engineers withdrew its opposition based on the railroad's acceptance of the Burlington conditions.

Most of the parties filed briefs which were due March 22, 1976.[4]

APPLICANT

The single track line of railroad proposed for abandonment is a 50.5 mile stub-end branch line which turns

[3] The survey noted that the Tennessee Department of Conservation wants to use the right-of-way for recreational purposes as part of the Natchez Trace Trail. If the abandonment is approved the L&N is agreeable to a condition which would keep the property under the track intact for 90 days pending an offer of purchase for recreational purposes.

[4] Applicant's brief arrived at the Commission on March 28, 1976. Its request to be allowed to file this brief late is granted.

BEST COPY AVAILABLE

out of the L&N's main line between Nashville and Bruceton, Tenn., at Colesburg, Dickson County and runs north-south about 40 miles west of Nashville. See Appendix A. The line is entirely within the state of Tennessee. It serves the following prepaid stations: Pomona, Tidwell, Lyles (pop. 500), Brown, Nunnelly (pop. 200), Elkins, Centerville (pop. 2,592), Deans, Watson, Buffalo, Theodore and Hohenwald (pop. 3,385).[5] The line consists of 80, 90 and 102 pound rail with approximately two miles of 62 and 68 pound rail located between M.P. 38 and 39 and M.P. 33 and 34, respectively The line has had a maximum speed limit of 10 m.p.h. since 1969. The weight restriction on the line is 220,000 pounds per gross car. The line has numerous grades that exceed 2 percent,[6] numerous curves that exceed 15 degrees,[7] 7 wooden trestles and 12 bridges. The L&N uses an F-7 locomotive on the line and the avrage train has 15 cars. It is not possible to add more power and run longer trains because of the curves and grades.

The line is served by a mobile agent out of Bruceton. In January, 1976, service was reduced from tri-weekly to once a week. A round trip on the Branch takes between 10 and 12 hours. When the service was tri-weekly, it was performed by a regular crew consisting of an engineer, a conductor and a brakeman who received two days pay.[8] It is now performed by an "extra crew". The engineer is based in Dickson but the other three people are out of Nashville and get deadhead time for the 80 mile trip it takes to get to and from Dickson.

The line has no local traffic and, of course, as a stub-end line it does not have any overhead traffic. In 1973, 1,308 carloads either originated or terminated on the line; in

[5] Population figures are from the 52nd edition of the Rand McNally Road Atlas.

[6] Exhibit 22 shows the location on the line by Mile Post designation of 150 spots where the grade exceeds 2 per cent. These total 16.54 miles.

[7] Tr. page 335-336, gives Mile Post designation for 14 curves that exceed 15 degrees.

[8] The Federal Hours of Service Law requires that a train crew can be on duty a maximum of 12 hours. In the opinion of the L&N's General Manager Transportation, it is hard to travel 101 miles at 10 m.p.h. and do the required switching in 12 hours so that crews usually get a day's pay for going out and one for coming back.

1974, 944 carloads and in 1975, 580 carloads.[9] Most of the traffic was either lumber or wood products or chemicals or allied products. A breakdown of traffic by commodity (Standard Transportation Commodity Code) is shown on Appendix B. This traffic yielded revenue to the rail industry of $376,300 in 1973; $433,500 in 1974 and $201,300 for the first nine months of 1975. Of these totals, the L&N received $258,700 in 1973; $270,000 in 1974 and $118,400 for the first nine months of 1975.

A railroad study of the line in 1965 showed that it was profitable by $50,000 or $60,000. Traffic declined considerably after July, 1966, when a shipper which generated 64 percent of the line's traffic, Tennessee Products and Chemical Corp., at Lyles went out of business.

The L&N figures the total avoidable on branch costs to be $157,789 for 1974. This figure includes actual expenses spent on the maintenance of way and structures ($22,933) and a per mile allocation to ascertain a figure for the maintenance of equipment ($27,157) and transportation ($69,226).[10] Using this total avoidable cost figure ($157,789) and assigning revenue to the line on the basis of car miles traveled over the Branch as compared with car miles over the rest of the L&N system ($31,696), the line lost $126,093 in 1974. Taking the total revenue earned to the L&N from traffic originating or terminating on the line ($270,064) and total avoidable expenses (on Branch of $157,789 and off Branch of $119,184, using the I.C.C.'s 50 percent rule to estimate off line expenses),[11] the line lost $6,909 the same year. The Railroad sees this figure as the benefit to it if the line had been abandoned in 1974. Using figures for January-September 1975, the line lost $44,949. The railroad's avoidable expenses and effect on operating income are shown on Appendix C and D.

[9] Tr. page 31-32, these figures covered cars where the interline settlements were received in the time period given. There is no reason to believe that actual car moves would differ significantly.

[10] Transportation includes ICC Accounts Nos. 373—Stations Employees and 376—Station Supplies. These are actual expense figures.

[11] The L&N contends that off Branch expenses would be higher using costs for the southern region in the I.C.C.'s Bureau of Accounts, "Rail Carload Cost Scales by Territories for the year 1973", Statement No. 101-73, Washington, D. C., August, 1975.

All of these calculations are based on the expense of tri-weekly service. Based on service once a week and using the traffic for 1974, the railroad would have broken even in that year and in 1975, based on 1975 traffic, would have lost $41,000.

The L&N admits that the line is now in poor condition. It has not performed a great deal of rehabilitation, hoping for a favorable determination of this application. It is able to maintain the line at minimum standards (10 m.p.h.) by performing spot maintenance; however, a general rehabiliation would involve replacing the light rail (9,244 linear feet), general retimbering, full stabilization and ditching to assure proper drainage. The result would put the line substantially above FRA Class I standards, but the physical conditions would prevent speeds over 25 or 30 m.p.h. The estimated cost of this rehabiliation and maintenance would be $602,100 expended over five years.

The railroad does not consider the area served by the Branch to be attractive for industrial development by companies who will use the railroad. It has not attempted to attract industry to this location since 1973 but even before then it did not enjoy much success in convincing companies to locate in this area. Since 1966 only one rail user has located on the line.

The L&N's balance sheet dated September 30, 1975, shows total assets and liabilities, including shareholders' equity, of $1.3 billion. Its income account shows net income transferred to retained income-unappropriated of $25.5 million in 1973, $37 million in 1974 and $16.9 million for the first nine months of 1975.

Between 1965 and 1974 the railroad's operating revenues have gone up 221 percent, from $274,613,000 to $607,-231,000, while its operating expenses increased 225 percent, 4 percent more, from $236,901,000 to $533,151,000.

The L&N is agreeable to the imposition of the Burlington conditions for the protection of employees on the Centerville Branch.

PROTESTANTS

The Department of Economic and Community Development of the State of Tennessee was created by Chapter 852 of the 1972 Tennessee Public Acts. The statute empowers The Department's Industrial Development Division to act with and/or on behalf of communities and business and industries throughout the state to assure their continuous economic and industrial growth. The department is concerned because of the adverse effect it believes abandonment would have on the future of Hickman and Lewis Counties. It fears that a loss of rail service would result in a shutdown by MMF Wood Products, a division of Fibreboard Corporation, located in Centerville and Lewis Products (American Biltrite Corporation) in Hohenwald. A shutdown by these two companies could cause unemployment for some 600 workers or about 7 percent of the counties' total employment. In November 1975 the unemployment rate for this two county area was 8.9 percent or 1½ percent higher than the Tennessee average. Also, although no direct relationship can be shown at this time between other industries in the area and the rail line, the Department fears this abandonment would diminish economic and industrial growth potential in an already economically underdeveloped area. For these reasons it opposes the abandonment.

Lewis Products Company is the name used by the plant at Hohenwald entirely owned by American Biltrite Corporation. The plant manufactures fire hose, hydraulic hose and steam hose. It was acquired by American Biltrite in 1961 and at that time occupied 165,000 square feet and employed 314 people. It has increased considerably and at the present time covers 307,900 square feet, employs about 541 people and had a payroll in 1975 of $4.6 million as compared with $2,120,000 in 1966.

American Biltrite receives carbon black, synthetic rubber, limestone, clay, asphalt, Hi Sil and Silene D by rail. All of these shipments move over the Centerville Branch. American Biltrite moved carbon black from its supplier

in Borger, Tex., to Hohenwald by motor carrier prior to 1972. In December, 1972, 10 months before this application was filed, American Biltrite requested information from the railroad on the status of the Centerville Branch. It was informed by the L&N that it did study individual branch lines periodically and had studied the Centerville Branch and concluded that no attempt would be made to abandon it at that time. Based on this information, American Biltrite installed a bulk unloading facility and a new railroad spur at a cost to it of $268,211. American Biltrite's annual rail traffic increased from 7.2 million pounds in 1972 to 11.9 million pounds through December 12, 1975. It projects that it will receive some 13.2 million pounds in 1976 and 14 million pounds in 1977. It does not ship outbound by rail.

If the line is abandoned, American Biltrite expects that it will incur an additional annual transportation cost of $186,093 to receive its raw materials by truck. A breakdown by commodity would be as follows:

COST DIFFERENTIAL*

Product	*Weight in lbs.*	*Rail Cost*	*Truck Cost*
Clay	1,800,000	$ 13 914	$ 22,140
Asphalt	200,000	1,280	2,600
Hi Sil	400,000	4,000	11,400
Silene D	400,000	4,000	9,040
Synthetic Rubber			
Baton Rouge	1,200,000	7,320	20,160
Baytown	1,200,000	10,400	23,400
Borger	1,200,000	9,120	25,200
Carbon Black	5,500,000	63,800	179,850
Limestone	2,100,000	7,423	13,440

There are not any motor carriers authorized to transport carbon black from the Borger, Texas origin. The figure is based on information supplied by Robertson Transportation Line at Houston, Texas.

American Biltrite is especially loath to change suppliers of carbon black. It has used the same supplier at Borger,

Tex., J. M. Huber Corp., for over 20 years and would like to continue inasmuch as this supplier controls natural gas sources which are basic to the production of carbon black and has always been able to supply material even in times of shortage. Also, the use of a new supplier would force American Biltrite to reformulate its production since each supplier has different characteristics in the chemical ananlysis of its product. Carbon black is an essential ingredient being used in 80 percent of 230 compounds and it must be handled very carefully because of the possibility of contamination and pollution. American Biltrite does not believe it could go back to receiving carbon black by bag because of regulations promulgated since 1972 by the Occupational Safety and Health Administration and Environmental Protection Agency.

If the line is abandoned, this would be the only plant of American Biltrite not to have rail service. Because of the amount of raw material it uses, rail service was one of the prime considerations for locating the plant at Hohenwald. The company believes the cost of trucking plus the cost of formulation changes would make the Hohenwald plant non-competitive and it believes the plant will close if the line is abandoned.[12] It is able to live with once a week service.

J. M. Huber Corporation is the major supplier of carbon black and clay to American Biltrite at Hohenwald. Carbon Black originates at Huber's Borger, Texas facility and clay from its plant at Langley, S. C. Almost all of this material moves by rail. In 1975 Huber shipped more than 6,000,000 pounds of carbon back and 1½ million pounds of clay to Hohenwald. Carbon black is highly contaminating and very difficult to handle so that Huber ships a great deal of carbon black in specially designed rail hopper cars that it owns or leases. Customers prefer to receive bulk shipments because it is cheaper and easier to handle. The technical staff of J. M. Huber does not believe that it will be able to ship carbon black in bulk to the nearest

[12] The transcript is erroneous at page 149. See correction on page 9 of the Brief of American Biltrite Corp.

railhead and then move it by truck to Hohenwald because the pellets, the form in which the carbon black is shipped, will break down and the material will become very difficult to handle. Huber has checked on truck rates from Borger, Tex., to Hohenwald, a distance of 963 miles and was told by a bulk carrier that the rate would be approximately $3.27 per hundred pounds based on a minimum of 45,000 pounds. The present rail rate is $1.16 per hundred pounds. Using truck rather than rail, the increased cost per ton to the receiver would be $42.20. The reason for the high rate is that equipment used to transport carbon black usually cannot be used for anything else so that in most cases it is a one way haul. Huber does not believe that it would absorb much of this increase where the product sells for $18 a ton. It fears losing this business which amounts to about $500,000 a year and the idling of its privately owned specialized rail cars which now earn some $66,000 a year in mileage allowances on this traffic.

Fibreboard Corporation with principal offices in San Francisco, Calif., is a manufacturer of paperboard, packaging and forest products. The company's Forest Products Group operates a plant consisting of a sawmill and chipper at Centerville that was formerly operated by MMF Wood Products Company.[13] Fibreboard also operates hardwood sawmills at Pulaski and Fayetteville, Tenn. Fibreboard acquired the mill at Centerville for $1,000,000 in December, 1973. It was aware of the abandonment application when it made the purchase. Most of the lumber produced at Centerville is used as pallet stock. The sawmill can process approximately 10 million board feet of lumber per year and the chipper has a capacity of from 40 to 50,000 tons per year. Chips are being sold to Wescor at Hawesville, Ky., 195 miles away, and Celotex Corporation at Paris, Tenn., 107 miles away, and are being moved to these customers over the Centerville Branch. If it used trucks, Fibreboard expects that the additional cost would be $3.45 per ton to Hawesville[14] and $1.89 per ton to

[13] The mill is at times said to be at Centerville (M.P. 32) at other times at Watson (M.P. 38). The traffic originates at Watson.

[14] These figures are from Fibreboard's brief, the transcript at page 203 shows an estimated increase of $5.42 per ton by truck over rail from Centerville to Hawsville.

Paris, and an estimated $120,000 for storage bins to hold the chips until trucks are ready for loading.

The cost of a loading facility at Colesburg, a point in the L&N's main line, plus trucks to move the chips there would be $300,000 not counting the expense of operating trucks the 75 miles round trip. It expects that if it became necessary to go to trucking to move its wood chips that it would have to go to private carriage or obtain the services of a contract carrier.

When Fibreboard acquired this plant, it had plans for expansion; however, because of the down turn in the economy it has not been possible to do so. The mill had 10 employees in January, 1976; if operating at capacity it would employ from 50 to 60 people. The sawmill only operated one month in 1975 and the last half of 1974. In this same time frame, the chipper was closed down for three months and only operated one shift the rest of the time. In 1970 MMF Wood Products shipped 968 cars, in 1971 514 cars, in 1972 386 cars and in 1973 885 cars. Fibreboard shipped 506 cars in 1974 and 377 cars in 1975.

Fibreboard contends that it has had consistent problems in acquiring adequate rail cars to satisfy its shipping needs.[15] It cites September, 1975, when it had material available for loading 107 cars and was only furnished 50 cars. In the third quarter of 1975 it had production available to ship 215 cars but was only furnished 157. In December, 1975, it ordered 33 cars and received 23 cars and in the months of January up through January 12, 1976, it had 22 cars on order and was furnished only 10.

Neither the Pulaski nor the Fayetteville mills have rail service immediately available. At Pulaski Fibreboard operates a dump truck to take wood chips to a railhead about 3 miles away where they are dumped into a chopper that feeds the rail car. Chips from Fayetteville are shipped by truck 96 miles to Stefson, Ala. Fibreboard uses three chip trailers that it owns for this move. In 1975 about 15,000

[15] Exhibit No. 21 compares cars pulled, placed and on hand at Watson in 1975. The L&N offered this to show that Fibreboard's claim that it did receive sufficient cars was false.

tons of chips moved from both of these plants. Considering the present market and prices for wood chips in the Tennessee area, Fibreboard expects that elimination of railroad service will result in its closing its facility at Centerville.

Celotex Corporation makes cardboard siding for the housing industry at its Paris, Tenn., mill. Celotex buys wood chips from Fibreboard at Centerville. It pays Fibreboard $14 a ton delivered Paris. It would only agree to pay more to receive chips in unusual circumstances. Outside of Fibreboard its furthest supply of wood chips is 65 miles away. These chips are trucked in. It sees an improvement in the market for wood chips by the summer of 1976 from the poor market that has existed for the last year or two. Prior to the recession it had 11 suppliers and received about 100 tons a week. It now uses seven suppliers and receives about 40 tons a week. It is aware of possible changes in wood consumption worldwide that could improve radically the area's marketing possibilties for wood chips.

Westcorp-Western Craft jointly own a plant at Hawesville, Ky., that produces paper for the manufacture of cardboard boxes. Over the past five years, Westcorp-Western Craft has purchased the following amounts of wood chips from Fibreboard at Centerville:

1970—	5,215	tons or	968	carloads
1971—	30,246	" "	514	"
1972—	18,254	" "	339	"
1973—	36,370	" "	742	"
1974—	16,602	" "	307	"
1975—	11,480	" "	219	"

It pays $11 a ton loaded on a rail car plus freight charges on approximately $4.47 a ton. About 35 of the company's suppliers ship by rail, most of the others, 75 or so, use their own trucks to make delivery. If rail rates increase, it would look for another source of supply to replace the volume it is buying from Fibreboard. It sees an increasing demand for wood chips from the Hickman and Lewis County area. Western Craft has an active land acquisition program in the area and owns approximately 60,000 acres of

timber land. Other companies such as Koppers are doing likewise.

The local chairman for the United Transportation Union testified that his organization had met with local representatives of the L&N in an attempt to modify the existing labor agreement governing employees on the Centerville Branch. The negotiations which took place in July to September, 1975, did not get anywhere because the L&N did not see benefit to it from the proposal. The union's position is that appropriate protective conditions should be included in any order issued by the Commission authorizing the abandonment.

Mr. T. C. Carroll, County Judge, for Lewis County, Tenn., presented a resolution passed by the Quarterly County Court of Lewis County on January 12, 1976, protesting the abandonment of the Centerville Branch.

Mr. Dol Willis, Mayor of Hohenwald, Tenn., believes the loss of rail service will make it practically impossible for Hohenwald and the surrounding area to attract heavy industry. The Mayor fears that a shut down by Lewis Products (American Biltrite Corp.) would idle 20 percent of the area's work force. This city has received Federal funds for improvement of the sewer system in Hohenwald and has also applied for a $250,000 grant to be used to improve the industrial park of about 56 acres located on the railroad, just south of Lewis Products. Mayor Willis is aware of several companies which produce cross ties. They include Koppers and Moss American. Hohenwald also has a stave mill that makes barrels and these staves are shipped on the railroad.

Mr. Hunt McClanahan, County Judge of Hickman County, testified that the county has an industrial park about a quarter of a mile from the railroad line. The judge is of the opinion that the large timber and phosphate resources in the county are a valuable source of future rail traffic. He believes that abandonment of the rail line would stop heavy industry from moving into the county. He disagrees with the railroad witness who testified that the land along

the branch is too hilly for industrial development. The city also has an industrial park for which it received a Federal grant in 1969 for utilities. This park is 200 yards from the ralroad. It has one industry located in it now but this industry does not use the railroad. Both the county and the city industrial park are 60 acres each in size. The judge named several industries which have located in the county in the last several years. Some of these are Tennessee Gas and Transportation Company at Nunnelly, MMF Land Company, Rivers Manufacturing Company and McCaleb Lumber Company. They are located on the branch and he says they use the railroad.

ARGUMENTS IN BRIEFS

Applicant contends that operation of the Centerville Branch will result in a continuing and undue burden on it and on interstate commerce, which burden is not outweighed by the present or future public convenience and necessity. It refers to the 12 cars per mile use of the Branch in 1975 and the regulations at 49 C.F.R. #1121.20-1121.24 to establish the presumption that the public convenience and necessity do not require the line's operation. It contends that protestants have failed to rebut the presumption. The evidence of future rail traffic is speculative. It questions the weight to be given the statement of American Biltrite that it will close operations if the line is abandoned and thinks the record shows that Fibreboard's mill at Watson might die a natural death regardless of the line's continuation. It defends the poor condition of the line citing *Missouri-Kansas-Texas R. Co. Abandonment, Oklahoma*, 338 I.C.C. 720 (1971) and points to two cases for the proposition that the Commission has allowed the abandonment of even marginally profitable lines upon a showing that extensive rehabilitation costs would not be recouped by the carrier within the foreseeable future. Finally, it defends the level of service over the line as that required by traffic demands.

In a joint brief the United Transportation Union, the Tnnessee Public Service Commission, the Department of

Economic and Community Development of the State of Tennessee, the community of Hohenwald and Lewis County and the community of Centerville and Hickman County, contend that applicant was presumptuous in treating the line with only spot maintenance while the application was pending. They move to hold the proceeding in abeyance pending action or inaction by the State of Tennessee in connection with the Railroad Revitalization and Regulatory Reform Act of 1976, PL 94-210.

American Biltrite Corporation and J. M. Huber Corporation contend that the losses sustained on the Centerville Branch of $20,045 in 1973 and $7,202 in 1974[16] are negligible when compared with the amount of railroad profits in those years. They think that railroad expenses could be reduced by once a week operations and negotiations with the unions. They see the $600,000 rehabilitation expense as window dressing since a witness admitted that if the application was denied the railroad would not do this level of maintenance. It sees the disadvantages to protestants as far outweighing the slight loss to applicant.

Fibreboard Corporation states that its operation is totally dependent on rail service over the Centerville Branch as there is no present alternative and the mill will close if the application is granted. It claims that the railroad has set the stage for this application by deliberate neglect of the line and that current revenue should not be compared with the cost of restoring the results of the railroad's past inactivity. It alleges that prolonged neglect and economic conditions have had a stunning effect on traffic and that another factor has been the L&N's failure to fill its car orders. It stresses the adverse impact abandonment would have on the entire area.

PRELIMINARY MATTERS

In its Supplemental Brief protestants Tennessee Public Service Commission, et al, moved to hold this proceeding in abeyance. This motion is denied. This application has

[16] This figure is $6,909 if you carry through the corrections made at Tr. page 328.

already been pending over two years and the indefinite delay proposed would be unconscionable. The terms of the Railroad Revitalization and Regulatory Reform Act of 1976 are clear and if the continuation of operations is as vital to the State of Tennessee as claimed on this record, there will be opportunity for the state to act to continue rail service.

DISCUSSION AND CONCLUSIONS

The Act states that no abandonment shall occur unless and until the Commission issues a certificate that the present or future public convenience and necessity permit such abandonment. To make this judgment it is necessary to weigh the arguments advanced pro and con.

The railroad's position is that the line loses money and there is no reasonable prospect that this will change. The railroad's $602,100 five year rehabilitation figure is of little weight since rail personnel admitted that they had no intention of spending that amount.[17] What is extremely relevant is that the line lost $20,045 in 1973, $6,909 in 1974 and $44,949 for the first nine months of 1975, based on the railroad's avoidable expense of $280,101 in 1973, $276,973 in 1974 and $163,492 for the first nine months of 1975. Protestants were not able to refute the railroad's position that these figures were compiled using accepted railroad accounting procedures and reflect the avoidable expenses of running this line.

We believe these figures are accurate. Grades of more than 2 percent and curves that exceed 15 degrees are sufficient to hinder rail operations. It only stands to reason then that a 50.5 mile line that has 16.54 miles of grades exceeding 2 percent, 14 curves of 15 degrees or more, 7 wooden trestles and 12 bridges will be expensive to maintain and service. Conditions on this line are such that the average length of a train is 15 cars yet longer trains would require more power and it is not possible to add another locomotive because of the grades and curves.

It is not clear on this record whether service modifications would cut the line's losses. Witness Willinger said his cost calculations for 1973-1975 were based on tri-weekly service and that if service has been rendered once a week, the line would have broken even in 1974 and lost $41,000 for the first nine months of 1975.[18] However, L&N's Assistant Superintendent of the Nashville Division said the line had once a week service during August through September 7, 1975,[19] and at times it sounded as if he thought that it was cheaper to run tri-weekly service.[20] Protestants contend that it would of course be cheaper but give no specifics. Even if it would be cheaper, Fibreboard says it would not be satisfied with service once a week if the market for wood chips improves at all. To be profitable the line needs more traffic. More traffic would necessitate more than once a week service because of the limited number of cars that can be moved on each train. Altering service does not then seem to be any solution.

Protestants contend that the line's losses are negligible compared with the railroad's overall profit. This argument is short sighted and self-serving and the Commission has rejected it consistently. *Southern Pacific Abandonment*, 72 I.C.C. 404, 407 (1922), *Chesapeake & Ohio Railway Co. Abandonment*, 242 I.C.C. 622, 627-628 (1940) and *New York Central R.R. Co. Abandonment*, 254 I.C.C. 745, 761 (1944).

The only two shippers to testify in opposition are American Biltrite and Fibreboard. Fibreboard's traffic dropped in 1974 and 1975. It says it could not get the number of cars it needed, the railroad denies it, but Fibreboard does not say it would have had more rail traffic if it got more cars. In other words its car usage accurately reflects all its rail traffic. Fibreboard admits its rail usage is low and relies on projections of business upturns. This evidence of future need for wood chips is an unsubstantiated, hopeful prognostication and will not be accorded much

[17] Tr. page 90.

[18] Tr. pages 52 and 329.

[19] Compare Tr. page 301 and 303, at first witness said he cut service to once a week for economic reasons, then he says it might be cheaper to run the train three times a wek.

[20] Tr. page 303.

weight. The commission held in *Fort Dodge, Des Moines & Southern Railway Co. Abandonment*, 312 I.C.C. 708, 711 (1961) that:

> Although allegations of future increases in traffic are made, they appear largely speculative and no estimate as to the amount of such traffic, the revenue which might be derived therefrom, or the anticipated time when it will materialize, is made.

Moreover Fibreboard's claim that it cannot economically truck wood chips is softened by the admission that it does not have rail service adjoining its two other Tennessee hardwood mills and trucks wood chips 96 miles to a customer or 3 miles to the nearest rail head. If this line is abandoned, the nearest rail point would be about 38 miles away.

Rail transportation of bulk commodities such as Fibreboard's wood chips and the carbon black, clay and chemicals of American Biltrite is undeniably cheaper for the person paying the freight charges. This economy is not however, a reason to force the railroad to continue a service on which it loses money. The judge is aware of the hardships that could very well occur, especially to American Biltrite and its 500 or so employees. Recent Federal legislation is designed to deal with these situations.

The Railroad Revitalization and Regulatory Reform Act, PL 94-210, enacted February 5, 1976, amends section 1 of the Interstate Commerce Act and also provides Federal assistance to states which decide to participate in rail freight assistance programs. Now when the Commission determines that the public convenience and necessity permit abandonment of line of railroad it must publish this finding in the Federal Register. If within 30 days of publication, it finds that afinancially responsible person (including a government entity) has offered financial assistance which will likely cover (A) the difference between the revenues attributable to the line and the avoidable cost of providing rail freight service, together with a reasonable return on the value of the line; or (B) the acquisition cost of all or a portion of the line, it must post-

pone the issuance of a certicate allowing abandonment for a maximum of 6 months to allow the parties time to reach an agreement and thus for the life of the agreement.

Inasmuch as the new statute is highly technical, affected parties might want to contact the Commission's Rail Services Planning Office, 1900 L Street, N.W., Washington, D. C. 20036 (Telephone 202-254-3281) for assistance. That office is charged with aiding states to decide whether to subsidize and for defining the terms that are used in the cost standards. Further details of procedures under the new law are in the Commission's Notice serve March 31, 1976, a copy of which is attached. Questions as to the procedures should be directed to the Commission's Section of Finance, Interstate Commerce Commission, 12th Street and Constiution Ave., N.W., Washington, D.C. 20423 (Telephone 202-275-7245).

As noted in footnote 2, the Tennessee Department of Conservation has indicated an interest in acquiring the right-of-way for recreational purposes. The L&N is agreeable to a condition which would give the Department 90 days after the railroad receives a certificate allowing abandonment to make an offer of purchase. (The Department might be interested in section 809 of the new law.) Such a condition will be included in my findings. There being no evidence as to the environment, I will accept the determinations made in the Commission's order served September 15, 1975.

One last argument to be treated is the blow abandonment will have on the area's industrial development. The evidence shows that only one company that uses the railroad has located on the line in 10 years. The other firms named by community spokesmen apparently move their traffic by other modes because they d(d not appear in opposition. This record is not convincing that the area's industrial growth will be damaged by the abandonment.

The railway labor unions have requested that if this line is authorized to be abandoned, the so-called *Burlington* conditions, as prescribed in *Chicago, B & Q R. Co. Aban-*

donment, 257 I.C.C. 700, be imposed for the benefit of employees who may be adversely affected by the abandonment. The *Burlington* conditions are customarily imposed in abandonment proceedings and they are appropriate for this situation.

FINDINGS AND ORDER

Upon consideration of all the evidence of record, the Administrative Law Judge finds that the present and future public convenience and necessity permit the abandonment by the Louisville and Nashville Railroad Company of the line of railroad which turns out of the L&N's main line at Colesburg, Dickson County, Tenn., and extends from Mile Post 2 to just south of Mile Post 52 near Hohenwald, Lewis County, Tenn., a distance of about 50.5 miles. Provided: That the L&N make available to employees the protective conditions set forth in *Chicago B & Q R. Co. Abandonment*, 257 I.C.C. 700 and that it hold the involved property under the tracks intact for 90 days following issuance to it of a certificate of public convenience and necessity permitting abandonment to allow for an offer of purchase by the Tennessee State Department of Conservation.

The Administrative Law Judge further finds that this is not a major Federal action significantly affecting the quality of the huuman environment within the meaning of the National Environmental Policy Act of 1969, 42 U.S.C. 4332, et seq.

It is ordered, That any person or government entity considering an offer of financial assistance to enable the rail service involved to be continued, should give notice promptly that it is considering such an offer by certified mail to the L&N and by first class mail to all parties of record and the Commission;

It is further ordered, That the L&N shall, within 10 days after receiving such a notice, make available to the party considering the offer of financial assistance the information described under the heading "Railroads Seeking Abandonment Authority," in the attached Notice of

the Commission entitled "Procedures for Pending Abandonment Cases," (Procedures) served and published in the Federal Register, 41 FR 13691, March 31, 1976, in the manner described in the Procedures;

It is further ordered, That upon this order becoming administratively final, notice of the finding of public convenience and necessity made herein shall be published in the Federal Register pursuant to the requirement of section 1a(6)(a) of the Interstate Commerce Act, as amended;

It is further ordered, That, notwithstanding any notice that financial assistance is being considered that may have been given pursuant to the above ordering paragraph, any person or government entity desiring to offer financial assistance to enable the rail service involved to be continued shall, within 15 days of publication in the Federal Register of the above-described finding of public convenience and necessity, send notification of such offer by certified mail to the L&N and the Commission and by first class mail to all parties of record, and such notification shall include the terms and information described under the heading, "Persons Offering Rail Service Assistance," which appears in the Procedures;

It is further ordered, That if the Commission finds that a financially responsible person has offered financial assistance in accord with the Procedures, the Commission shall postpone the issuance of a certificate of abandonment for such reasonable time, not to exceed 6 months, as is necessary to enable such person or government entity to enter into a binding agreement with the L&N to provide financial assistance for continued rail service or to purchase the rail line;

It is further ordered, That when the Commission is informed of the execution of any financial assistance agreement or acquisition and operating agreement, the issuance of the certificate of abandonment shall be postponed for such period of time as such an agreement (including any extensions or modifications) is in effect;

It is further ordered, That all correspondence to the Commission with respect to offers of financial assistance for the continued operations or acquisition of the subject line shall contain an appropriate reference to the subject proceeding; and that on the lower left-hand corner of envelopes containing such correspondence the following notation shall be typed in boldface "AB-RSCP";

It is further ordered, That subject to the conditions set forth above, an appropriate certificate of abandonment shall be issued, and the L&N shall not effect any abandonment or discontinuance of service prior to the effective date of such certificate of abandonment.

And it is further ordered, That this order shall be effective 20 days from the date of service in the absence of the filing of exceptions (appeal) or of a stay by the Commission.

Dated at Washington, D. C., this 17th day of May, 1976.

By the Commission, Brenda P. Murray,

By the Commission,

BRENDA P. MURRAY,
Administrative Law Judge

ROBERT L. OSWALD,
Secretary

(SEAL)

INTERSTATE COMMERCE COMMISSION

Washington, D.C.

NOTICE

PROCEDURES FOR PENDING RAIL ABANDONMENT CASES

Information to interested persons concerning the implementation of section 1a(8) of the Interstate Commerce Act, as amended by the Railroad Revitalization and Regulatory Reform Act of 1976, Public Law 94-210,

enacted on February 5, 1976, which relates to abandonment or discontinuance of operations proceedings filed prior to the promulgation of new regulations pertaining to such proceedings.

General

The purpose of this Notice is to provide information about the Interstate Commerce Commission's proposed means for handling pending railroad abandonment and discontinuance proceedings and the procedures it will follow in processing abandonment applications already on file or filed before final regulations are effective. "Abandonment" means the elimination of a rail line and includes a discontinuance of operations. "Discontinuance" means only the cessation of operations over the line. The term "abandonment" is used in this notice to embrace both situations.

Changes in the Commission's abandonment procedures were made necessary by the enactment, on February 5, 1976, of the Railroad Revitalization and Regulatory Reform Act of 1976 (Public Law 94-210). The need to process some 200 pending rail abandonment applications makes it imperative that these procedures be instituted as soon as possible, and precludes the opportunity for public comment at this time.

The procedures described in this Notice are of an interim nature and will apply, effective upon the date of their publication, to all cases in which the Commission authorizes the abandonment of a line of railroad pursuant to an application currently on file with it or filed before final regulations are effective. The Commission will soon issue a notice of proposed rulemaking looking toward the issuance of permanent regulations to govern subsequently filed abandonment applications. The procedures set forth in this Notice may be modified in view of the results of the proceeding.

New Abandonment Provisions

The procedures described in this Notice implement new paragraphs 1a(6) and (7) of the Interstate Commerce

Act. Those paragraphs contain new provisions under which—

1. The Commission must provide public notice, through Federal Register publication, of each instance in which it finds that the public convenience and necessity would permit a railroad to abandon trackage or discontinue service.

2. Persons, including governmental entities, wishing to preserve rail freight service set for discontinuance or abandonment may offer to purchase the line for continued operation or provide financial assistance to the railroad in the form of a "rail service continuation payment" (which may be conveniently termed an operating subsidy). In the words of new paragraph 1a(6) of the Interstate Commerce Act, the financial assistance must "(A) cover the difference between the revenues which are attributable to such line of railroad and the avoidable cost of providing rail freight service on such line, together with a reasonable return on the value of such line; or (B) cover the acquisition cost of all or any portion of such line or railroad."

3. If, within 30 days after publishing its finding that a proposed abandonment should be authorized, the Commission finds that a "financially responsible" person has made an offer likely to cover the losses on the line plus a reasonable profit, or to cover the cost of acquisition of all or any portion of such line, it must postpone the issuance of the certificate of abandonment (thus, in effect, requiring that service continue) for a period up to 6 months while negotiations for financial support take place. By the end of that 6 month period a binding agreement must be executed by the railroad and the offeror or a certificate authorizing the abandonment will be issued.

4. The applicant railroad is required to make available promptly to any person considering an offer of financial assistance its latest information about the physical condition of the line and data sufficient to permit computation of the amount of subsidy needed to justify continued operation.

5. Whenever an offer of financial assistance is made, the

Commission must determine the amount by which the avoidable costs attributable to the line, plus a reasonable return on the value of the rail properties involved, exceed the revenues attributable to the line, thus providing assistance to any offeror of a subsidy in determining the amount that would have to be paid. The Standards for Determining Rail Service Continuation subsidies, 49 C.F.R. §1125, adopted by the Commission's Rail Services Planning Office for the development of estimated subsidy payments under the Regional Rail Reorganization Act of 1973, shall be used in developing estimated payments under these new provisions.

6. The Commission must postpone the issuance of the certificate of abandonment for the period that any assistance or acquisition and operating agreement remains in effect.

The Local Rail Service Assistance Program

The new abandonment provisions of the Interstate Commerce Act are related to other provisions of Public Law 94-210. Section 803 of that act establishes a nationwide local rail services assistance program, to be administered by the United States Department of Transportation, under which the Federal government may reimburse the States for all or a portion of the funds expended by them in preserving or improving local rail freight service. The program becomes effective July 1, 1976, and extends through June 30, 1981. To be eligible for Federal aid, a State must develop a State rail services plan acceptable to the Secretary of Transportation, and comply with certain other statutory rquirements and with regulations to be issued by the Secretary.

In deciding how to implement the new abandonment provisions of the Interstate Commerce Act, the Commission has considered the local rail service assistance program. While recognizing that the States will need some time to prepare to take advantage of this program, the Commission has determined that there is no need to delay the processing of pending rail abandonment cases. Rela-

tively few of them are in the final stages where an "administratively final" Commission order is imminent. An order of the Commission's employee boards, commonly called review boards, becomes administratively final upon the failure of any party to seek reconsideration of a board's decision. The initial decision of an Administratve Law Judge becomes administratively final if exceptions are not filed, unless the decision is stayed by the Commission. In most instances, a decision of the Commission or a divison of the Commission becomes administratviely final on the date on which it is served.

While it is our intention to process pending abandonment cases to their conclusion, any finding that an abandonment should be authorized will be made subject to conditions to assure that any State or individual considering making an offer of financial assistance will be given time to pursue that end, in accordance with the time limits discussed below. It would facilitate the processing of these cases, and enable the Commission to better deal with rail assistance proposals if persons interested in making such proposals could make that fact known as early as possible in each abandonment proceeding. Any party considering the making of an offer of financial assistance may do so at any time during the pendency of the abandonment proceeding. Notice of the intention to offer financial assistance must be in written form, with appropriate reference to the proceeding involved, and must be served by certified mail upon the carrier seeking abandonment and first class mail upon all parties of record and the Commission.

It should be emphasized that submission of the notice of intent to offer financial assistancee will not be used as an element supporting a decision authorizing an abandonment. The purpose of the notice is to provide persons with the information necessary to decide whether to offer financial assistance; to afford the railroads an opportunity to provide the required information; and to facilitate the Commssion's action on the offer.

The Commission's Abandonment Procedure

In finding that any abandonment of rail freight service

should be authorized, the Commission will impose conditions giving full effect to the provision of the new law providing for the retention of service through rail service assistance payments. No certificate authorizing an abandonment will be issued until the finding that the abandonment should be authorized is served upon all parties and the governor of each State in which the trackage is located, and is published by notice in the Federal Register.

Issuance of the certificate of abandonment will be postponed for up to 6 months if, within 15 days of the publication of the Federal Register notice, the Commission receives notice that an offer of financial assistance has been made by a person shown to be financially responsible and determines that the offer is likely to cover the cost of acquiring all or part of the line or the losses incurred in operating the line plus a reasonable return on the value of the line.

The Commission will adopt the same conceptual approach developed by the Rail Services Planning Office in connection with the regional subsidy program authorized by the Regional Rail Reorganization Act of 1973 for the purposes of estimating the subsidy payment. It is recognized that there are statutory differences in the two programs. These differences relate primarily to the exclusion of a management fee in the national program, the inclusion of certain additional costs as set forth in section 1a(11) of the Interstate Commerce Act, and the basis upon which a reasonable return is to be calculated. The Commission will take these differences into consideration in establishing the subsidy payment. The Real Services Planning Office, whose address appears at the end of this notice, will provide copies of the standards as well as technical assistance to the railroads and to potential subsidizers in developing the estimates.

For the Commission to postpone the issuance of a certificate for a period not to exceed 6 months, to allow an offeror and the railroad to enter into a binding agreement for financial assistance, the notification to the Commission of an offer must include information sufficient to support

the statutory finding that the assistance offered is likely to cover the difference between the revenues attributable to the line of railroad and the avoidable cost of providing freight service over that line plus a reasonable return on the value of that line, or that it is likely to cover the acquisition cost of all or a portion of the line. The Commission is required by section 1a(6)(a)(ii) to make such a finding before postponing the issuance of a certificate.

When the Commission by order postpones issuance of a certificate for up to 6 months, the railroad and the offeror have that period to execute an assistance or acquisition and operating agreement. Upon notification that such a binding agreement has been executed, the Commission shall further postpone the issuance of a certificate for the period such an agreement is in effect, including extensions. The Commission's abandonment order will provide that issuance of a certificate of abandonment will be postponed if the railroad and the person offering assistance enter into a binding agreement for continued operations and that the postponement will be for the period of the agreement.

Such an agreement may be based on any form of financial assistance acceptable to the railroad and the person offering financial assistance. From time to time in abandonment proceedings before the Commission, railroads allege that the cost of rehabilitation necessary for efficient operation is so high that continued operations are economically infeasible. Therefore, instances may arise in which a railroad will accept an offer to finance rehabilitation of a line and will enter into a financial assistance agreement providing for continued operations on that basis. For example, a State or other interested person might rehabilitate the line, and the railroad, relieved of the rehabilitation cost, may then be able to operate the line at a profit. As previously noted rehabilitation costs paid for by a State may be eligible for reimbursement by the Federal Government.

If a binding agreement is not reached because of the railroad's refusal to accept an offer which the Commission finds sufficient to satisfy the statutory requirements for

continued operation under subsidy, the abandonment proceeding may be reopened within the 6 month postponement period so that the Commission, on the basis of the new facts, may reconsider the question of whether the abandonment should be authorized.

A further condition will be imposed that requires the railroad to make available its most recent reports on the physical condition of the line, and information makng it possible to compute an adequate rail services continuation payment, to any person notifying the railroad that he is considering making an offer of financal assistance requiring such information.

The certificate issued by the Commission in an abandonment proceeding will be made subject to such conditions as may be required by the public convenience and necessity, and shall include provisions for the protection of the interests of railroad employees.

Persons Offering Rail Service Assistance

Because of statutory time limits imposed upon the Commission, anyone making an offer of financial or other assistance in order to provide for the continuation of rail freight service that would otherwise be abandoned, should make certain that the Commission receives notice of such offer within 15 days of the publication in the Federal Register of notice of the finding that the abandonment should be authorized. That notification should include:

1. A copy of a firm offer to provide assistance, stating clearly the amount of money or other consideration offered and any terms or conditions to the offer. The offeror should certify that the offer has been made to the railroad.

2. Information demonstrating the financial responsibility of the person making the offer. The offeror should submit evidence demonstrating that it has, or will have at the time the proposed agreement is to be executed, appropriate authority, and the necessary funds, to enter into and fulfill contracts of the kind contemplated. If the offeror is not a government entity, the information demonstrating fi-

nancial responsibility must include, but need not be limited to:

(a) A balance sheet showing its financial condition as of the latest available date but no more than 6 months prior to the date of the notification to the Commission, and

(b) An income statement showing its revenues, expenses, and net income for the current calendar year to the latest available date and for each of the two preceding calendar years.

3. Information sufficient to support a finding by the Commission that the assistance being offered is likely to cover the difference between the revenues attributable to the line of railroad and the avoidable costs of providing rail fright service over the line, plus a reasonable return on the value of the line; or that it is likely to cover the cost of acquiring all or a portion of the line.

Railroads Seeking Abandonment Authority

A railroad which is an applicant for authority to abandon a line of railroad or a rail service shall be required to make available to any person informing it that it is considering offering financial assistance and requesting such information, within 10 days of receiving such notification whether such notification is received before or after the publication in the Federal Register

1. Its most recent reports on the physical condition of the line of railroad which is the subject of application.

2. A current report on the train service on the line and a current report on the traffic and revenue attributable to the line.

3. An actual computation of the extent to which the avoidable cost of providing rail freight service on such line of railroad, plus a reasonable return on the value of the rail propertiees involved, exceed the revenues attributable to such line of railroad, as determined by the Standards for Determining Rail Service Continuation Subsidies, 49 C.F.R. §1125.

The information described above shall either be furnished to the offeror of financial assistance or be made available for examination, during regular working hours, at a location within each State within which is located the line of ralroad which is the subject of the abandonment application or some other location acceptable to the offeror. Information concerning the nature, kind, quantity, destination, consignee, or routing of traffic shall, in the railroad's discretion, be made available to the offeror, provided all affected parties consent or disclosure is otherwise made in accordance with section 15(11) of the Interstate Commerce Act, 49 U.S.C. §15(11).

Compliance with Time Limits

In view of the statutory requirements imposed upon the Commission, all parties, both offerors of financial assistance and railroads seeking certificates for abandonment or discontinuance of lines of railroad, will be required to adhere strictly to the time limits set forth in this Notice. Failure to do so could prevent the Commission from making its required findings within the 30 day statutory per iod, and may result in an adverse decision to the party in default.

Rail carriers which have pending applications seeking authority to abandon or discontinue lines of railroad should consider, at least in proceedings under protest, supplementing their applications with the material necessary for parties to determine the possible requirements for rail service continuation payments or acquisition of the line in order to continue rail service. Persons considering making an offer of a rail continuation payment, in order to provide for continued service over a line for which a certificate for abandonment or discontinuance is being sought, should indicate their intention without delay—if possible, prior to the publication in the Federal Register of the Commission's findings.

In order to expedite the handling of submissions to the Commission, envelopes mailed to the Commission either by carriers or offerors should have the initials AB-RSCP

printed in the lower left hand corner, and the docket number of the proceeding, if known.

Further Information

Persons wishing information about the status of a particular abandonment proceeding or about the filing of pleadings, requests for leave to intervene, and similar procedural matters should contact the Section of Finance, Interstate Commerce Commission, 12th Street and Constitution Avenue, N.W., Washington, D.C. 20423 (telephone: 202-275-7245).

Persons desiring information about the rail freight services assistance program or about the computation of assistance payments should contact the Rail Services Planning Office, Interstate Commerce Commission, 1900 L Street, N.W., Washington, D.C. 20036 (telephone 202-254-3281).

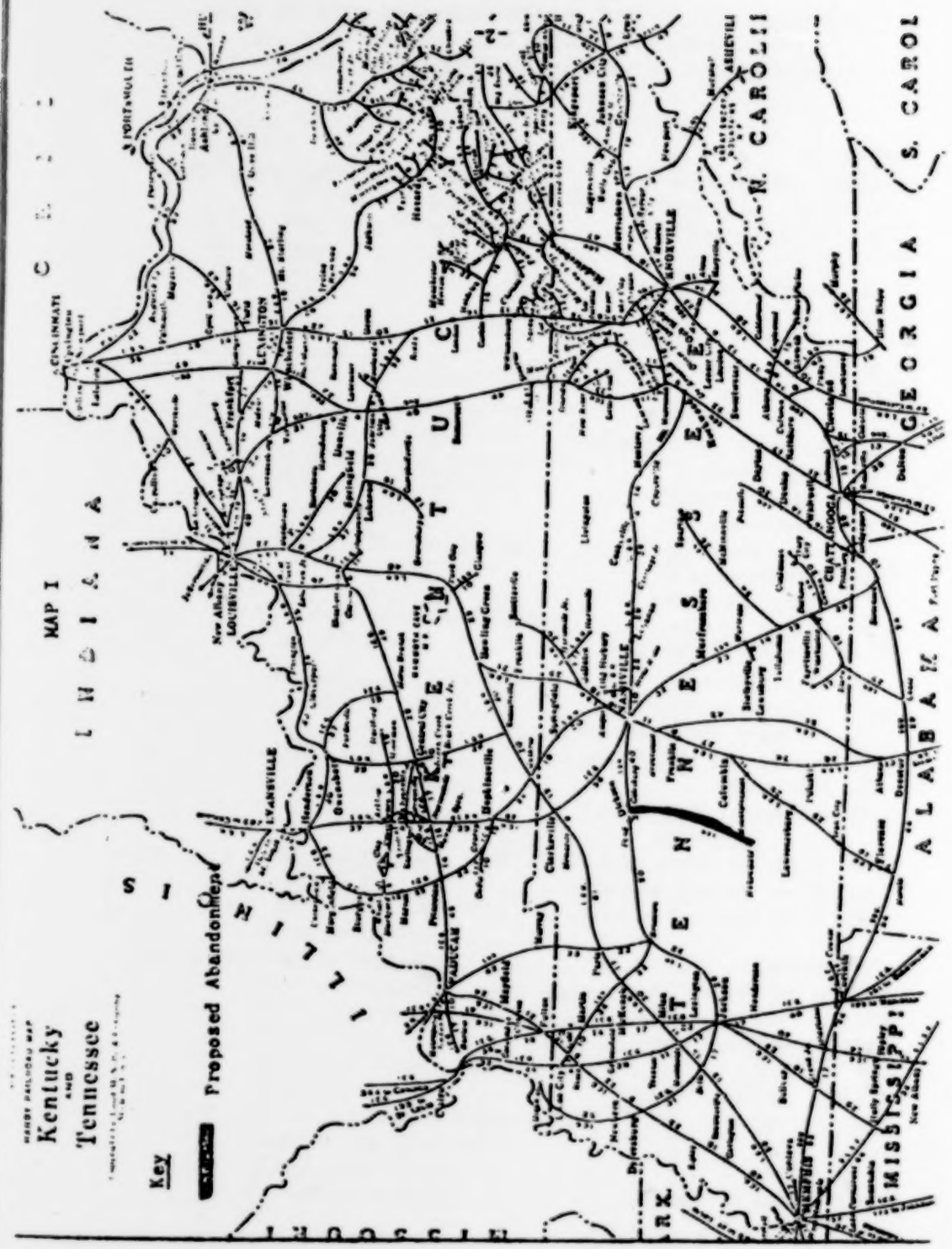
By the Commission.

Dated March 24, 1976.

ROBERT L. OSWALD,
Secretary.

(SEAL)

APPENDIX A



BEST COPY AVAILABLE

APPENDIX B

FREIGHT HANDLED TO AND FROM POINTS ON THE CENTERVILLE BRANCH AND POINTS BEYOND ORIGINATED OR TERMINATED TRAFFIC (NOTE A)

STCC Number	Description	1973 Cars	1973 Tons	1974 Cars	1974 Tons	Jan.-Sept.* 1975 Cars	Jan.-Sept.* 1975 Tons
01	Farm Products	3	276	...	.....	...	.....
08	Forest Products	5	192	3	107	2	60
11	Coal	7	478	3	208	...	.....
14	Non-Metallic Minerals	5	291	...	.....	5	400
20	Food or Kindred Products	2	65	3	108	...	.....
22	Textile Mill Products	2	15	...	.....	1	15
24	Lumber or Wood Products	1,097	54,497	739	38,745	295	13,510
25	Furniture or Fixtures	1	60	...	.....	...	.....
26	Pulp, Paper or Allied Products	1	45	...	.....	...	.....
28	Chemicals or Allied Products	69	4,246	88	5,795	63	3,890
29	Petroleum or Coal Products	20	370	9	188	5	151
30	Rubber or Misc. Plastic Products	....	.....	1	10	2	44
32	Clay, Concrete, Glass or Stone	59	2,713	58	2,451	37	1,616
33	Primary Metal Products	25	1,222	8	454	3	101
34	Fabricated Mill Products	5	92	6	151	...	.....
35	Machinery	1	10	...	.....	...	.....
36	Electrical Machinery or Equipment	1	74	1	11	1	9
40	Waste or Scrap Material	3	79	2	38	3	60
41	Misc. Freight Shipments	...	.....	2	55	...	.....
46	Misc. Mixed Shipments	2	125	21	1,018	...	.....
	TOTAL	1,308	64,850	944	49,339	417	19,856

(NOTE A)—There were no less than carload shipments for any of above periods.

*Total traffic for 1975 was 580 CL.

APPENDIX C

LOUISVILLE AND NASHVILLE RAILROAD COMPANY CENTERVILLE, TENNESSEE BRANCH AVOIDABLE EXPENSES BY I.C.C. ACCOUNTS FOR THE YEARS 1973, 1974 AND THE PERIOD JANUARY THROUGH SEPTEMBER, 1975

ICC Account Number	Expense Description	1973	1974	Jan.-Sept. 1975
	Maintenance of Way and Structures			
202	Roadway Maintenance	$ 2,421	$ 2,693	$ 446
208	Bridges, Trestles and Culverts	3,483	7,847	546
212	Ties	7,257	2,183	.....
214	Rails	109	148	.....
216	Other Track Material	595	550	.....
218	Ballast	160	.....	.....
220	Track Laying and Surfacing	11,214	4,439	9,437
227	Station and Office Buildings	165	.....	.....
229	Roadway Buildings	.....	286	95
266	Road Property Depreciation	4,062	4,062	3,047
273	Public Improvements, Maintenance	787	.....	.....
277	Employees' Health & Welfare Benefits	906	725	716
	Total Maintenance of Way & Structures	$ 31,159	$ 22,933	$ 14,287
	Maintenance of Equipment			
311	Locomotive Repairs	$ 6,906	$ 6,491	$ 4,463
314	Freight Train Car Repairs	11,799	7,822	4,756
331	Equipment—Depreciation	17,396	12,453	8,602
335	Employees' Health & Welfare Benefits	558	391	252
	Total Maintenance of Equipment	$ 36,659	$ 27,157	$ 18,073
	Transportation			
373	Station Employees	$ 1,702	$ 1,656	$ 1,061
376	Station Supplies	215	213	208
392	Train Enginemen	18,396	17,973	14,983
394	Train Fuel	5,685	10,925	7,514
400	Servicing Train Locomotives	1,374	1,368	941
401	Trainmen	36,168	33,913	24,714
402	Train Supplies and Expenses	339	134	152
404	Signals and Interlockers	71	92	54
409	Employees' Health & Welfare Benefits	3,196	2,952	2,244
	Total Transportation	$ 67,146	$ 69,226	$ 51,871

	Income Accounts—Debit			
532	Railway Tax Accruals			
	(a) Payroll Taxes	$ 9,611	$ 11,377	$ 8,893
	(b) Ad Valorem Taxes	18,927	21,060	15,795
536	Hire of Freight Cars	3,818	6,036	3,082
	Total Income Accounts—Debit	$ 32,356	$ 38,473	$ 27,770
	Total Avoidable Expenses on Branch	$167,320	$157,789	$112,001

APPENDIX D

LOUISVILLE AND NASHVILLE RAILROAD COMPANY EFFECT ON NET RAILWAY OPERATING INCOME UPON ABANDONMENT OF CENTERVILLE BRANCH FOR THE YEARS 1973, 1974 AND THE PERIOD JANUARY THROUGH SEPTEMBER, 1975

	1973	1974	Jan.-Sept. 1975
L&N Gross Revenue Earned from Traffic to or from Points on the Line Proposed to be Abandoned and also Handled on other Portions of the L&N System			
I.C.C. Account 101—Freight	$258,666	$269,934	$118,374
I.C.C. Account 137—Demurrage	1,390	130	170
Total System Revenue	$260,056	$270,064	$118,544
L&N Gross Revenue Assignable to the Centerville Branch			
I.C.C. Account 101—Freight	$ 33,104	$ 31,566	$ 15,390
I.C.C. Account 137—Demurrage	1,390	130	170
Total Revenue Assignable to Branch	$ 34,494	$ 31,696	$ 15,560
L&N Gross Revenue Assignable to other Portions of the L&N System			
I.C.C. Account 101—Freight	$225,562	$238,368	$102,984
Avoidable Expenses on Branch			
Maintenance of Way and Structures	$ 31,159	$ 22,933	$ 14,287
Maintenance of Equipment	36,659	27,157	18,073
Transportation	67,146	69,226	51,871
Income Accounts—Debit	32,356	38,473	27,770
Total Avoidable Expenses on Branch	$167,320	$157,789	$112,001
Net Profit or (Loss) from Operating Branch Line	($132,826)	($126,386)	($ 96,727)
Net Profit when using 50% Rule of I.C.C. on L&N Gross Revenue Assignable to other Portions of the L&N System			
I.C.C. Account 101—Freight	$112,781	$118,184	$ 51,492
Net Profit or (Loss) to System	($ 20,045)	($ 6,909)	($ 44,949)
Net Effect on Operating Income upon Abandonment	$ 20,045	$ 6,909	$ 44,949